Supreme Court, U.S.
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No. ~~04-1319~~

In the

Supreme Court of the United States

ROGER MELTON, Individually and as next friend of his son, Jason Melton; SUE MELTON, Individually and as next friend of her son, Jason Melton; ADVOCACY, INCORPORATED
Petitioners,

v.

DALLAS AREA RAPID TRANSIT
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fifth Circuit erred in holding that public transportation providers regulated under part B of Title II of the Americans with Disabilities Act (the ADA) are not required to make reasonable modifications to their programs to accommodate persons with disabilities.

2. Whether the Fifth Circuit erred in holding that the regulations in part A of Title II of the ADA do not apply to public transportation providers regulated under part B of Title II.

3. Whether the Fifth Circuit erred in holding that public transportation providers regulated under part B of Title II of the ADA are not required under the Rehabilitation Act to make reasonable modifications to their programs to accommodate persons with disabilities.

PARTIES TO THE PROCEEDING

The names of all parties to this proceeding appear on the cover page.

Pursuant to Rule 29.6 of this Court's rules, Petitioners state that Petitioner, Advocacy, Inc., is a non-profit corporation that has no stock. No publicly held company owns any interest in Advocacy, Inc.

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The Fifth Circuit Court of Appeals opinion is reported as *Melton v. DART,* 391 F.3d 669 (5th Cir. 2004).[1] The District Court opinion is reported as *Melton v. DART,* 326 F. Supp. 2d 767 (N.D. Tex. 2003).[2]

JURISDICTION

The Fifth Circuit filed its opinion on November 19, 2004, and denied the Meltons' Petition for Rehearing by order filed on January 5, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the Fifth Circuit's decision on a writ of certiorari.

STATUTORY AND REGULATORY PROVISIONS INVOLVED[3]

Statutes

29 U.S.C. § 794(a)

42 U.S.C. § 12101(a)(5)

42 U.S.C. § 12131

42 U.S.C. § 12132

42 U.S.C. § 12133

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[1] Appendix, A–13

[2] Appendix, A–30

[3] The statutes and regulations are reproduced in the appendix. See index at A–1.

42 U.S.C. § 12134(a).

42 U.S.C. § 12143(b)

42 U.S.C. § 12149

Regulations

28 C.F.R. § 35.102(b)

28 C.F.R. § 35.130(b)(7)

28 C.F.R. pt. 35, App. A

49 C.F.R. § 27.7(a)(b)(4)(i)

49 C.F.R. § 27.19(a)

49 C.F.R. § 37.21(c)

49 C.F.R. pt. 37, App. D

STATEMENT OF THE CASE

Petitioners seek a writ of certiorari to review the Fifth Circuit's holding that Dallas Area Rapid Transit (DART), a local governmental provider of paratransit services, is not required to make reasonable modifications to its policies and procedures in order to pick up Jason Melton, a severely disabled paratransit rider, in the public alley behind his home instead of requiring him to travel a block down the alley to a pickup point on a street.

Jason was born on February 10, 1969. When he was thirteen, he was struck by a drunken driver while riding his bicycle. As a result of his injuries, he is non-verbal and mentally incompetent. His mental age is roughly that of a two-

year-old child.

Jason lives with his parents. He requires an electric winch to lift him from his bed and into a wheelchair or the bathtub. Jason's principal opportunity for instruction and socialization outside the family comes from trips to the Bachman Recreation Center. He requires an attendant to go with him on these trips and the use of paratransit services.

The Melton home, located in the northern part of Dallas, sits about six feet above the level of the street in front of it. Because of this difference in elevation, the front yard of the house presents a steep slope that prevents the Meltons from taking Jason down to the street in his wheelchair. The home has a rear garage opening onto a paved public alley. The Meltons have constructed a ramp in the garage that provides access for Jason to the rear drive and the alley.

DART is the designated local governmental agency for the providing of paratransit services to persons who are disabled in the area where the Meltons live. Jason is qualified to receive paratransit services by virtue of his previously described disability. From 1992 through the first part of 1999, DART provided paratransit services for Jason, which included picking him up in the paved public alley behind his house.

In 1999, DART suddenly refused to provide pickup in the alley and instead indicated it would pick Jason up at the end of the alley where it enters the street, a distance of two-tenths of a mile, or approximately one block, away.

Requiring Jason and his attendant to go down the alley with a wheelchair creates unreasonable safety problems. There is no sidewalk or paved area for operation of the wheelchair,

so that it has to go down the alley itself, creating a danger of collision with vehicles backing from driveways and driving down the alley.

Because of his brain injury, Jason cannot tolerate extremes of temperature. He is subject to seizures which may be brought on by these extremes. For this reason, it is important to limit the time he has to wait outside for the paratransit vehicle.

In the spring of 2000 and again in the winter of 2001, attorneys for Advocacy, Inc.,[4] wrote DART and requested modification of paratransit services so that Jason would be picked up in the alley behind his home. In both cases, DART responded by denying the request. AI requested an administrative appeal of DART's decision but DART declined to permit such an appeal.

REASONS FOR GRANTING THE PETITION

I. THE HOLDING OF THE FIFTH CIRCUIT CONFLICTS WITH THE PLAIN LANGUAGE OF THE ADA AND ITS IMPLEMENTING REGULATIONS.

II. THE HOLDING OF THE FIFTH CIRCUIT CONSTRUING THE ADA CONFLICTS WITH THE

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[4] Advocacy, Incorporated, is the designated Protection and Advocacy agency for the State of Texas under the Developmental Disabilities Act, 42 U.S.C. § 15043, and receives funding under a federal grant to the State of Texas for the provision of services to individuals with traumatic brain injuries pursuant to 42 U.S.C. § 300d-53.

OPINION OF ANOTHER CIRCUIT COURT.

III. THE HOLDING OF THE FIFTH CIRCUIT CONSTRUING THE REHABILITATION ACT CONFLICTS WITH THE PLAIN LANGUAGE OF THE ACT AND ITS IMPLEMENTING REGULATIONS, WITH OPINIONS OF THIS COURT, AND WITH THE OPINION OF ANOTHER CIRCUIT COURT.

Certiorari is sought because this case presents a question of extraordinary importance – whether public transit services are exempt from any need to comply with Title II, part A of the Americans with Disabilities Act,[5] from any need to comply with any part A regulations, and from providing reasonable modifications to services under both the ADA and the Rehabilitation Act.

The Fifth Circuit opinion will have an enormous impact. Respondent DART provides nearly 95 million rides per year, and almost 600,000 of those are for people whose disabilities are so severe that they cannot ride mainline transit.[6] Statewide, Texas transit systems provide over three-and-a-half million rides per year to passengers with disabilities or who are elderly.[7] Nationwide, there are over five thousand transit systems providing 103 million trips per year as part of their demand-responsive service (like the paratransit service at issue

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[5] 42 U.S.C. § 12131, et seq.

[6] http://www.dart.org/annualreport.asp?zeon=03ARmultimodal#multimodal.

[7] 2001 Texas Transit Statistics, p. 1 (Tex. DOT), http: //www.dot.state.tx.us/PTN/documents/stat2001.pdf.

here).[8]

The importance of transportation service to people with disabilities can neither be doubted, nor overstated. In passing the ADA, Congress explicitly recognized that "discrimination against individuals with disabilities persists in such critical areas as . . . transportation," 42 U.S.C. § 12101(a)(3), and transportation barriers have a discriminatory effect on people with disabilities. 42 U.S.C. § 12101(a)(5). President Bush, in announcing his "New Freedom Initiative" for people with disabilities stated: "Wherever any job or home, or means of transportation is unfairly denied because of a disability, we must work to change it. Wherever any barrier stands between you and the full rights and dignity of citizenship, we must work to remove it, in the name of simple decency and simple justice."[9] The United States Department of Transportation acknowledges that "[t]ransportation is a vital element of independent living for all Americans. Public transportation is especially important for people with disabilities, many of whom depend on it to achieve independent lives, to access jobs and social events and to sustain productive careers."[10]

The modification his parents requested for Jason

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[8] http://www.bts.gov/publications/national_transportation_statistics/2003/html/table_transit_profile.html.

[9] Remarks by the President in Announcement of New Freedom Initiative (Feb 1, 2001), http://www.whitehouse.gov/news/releases/20010201-3.html.

[10] http://www.disability.gov/digov-public/public/DisplayPage.do?parentFolderId=126.

Melton was quite modest. They requested DART to pick him up in the alley behind his house, as DART had done for seven years with no problems before its sudden change in policy, rather than requiring him to travel a block down the alley in his wheelchair.

If DART is not required to make reasonable modifications to its policies, many unnecessary hardships are likely to be visited on its paratransit customers. DART could refuse to drive into hospital and apartment parking lots, and require paratransit riders to enter and exit on the nearest public street. It could refuse to modify its plan requirements regarding time limits for pickups in order to meet special needs, and could unreasonably refuse to make pickups at certain locations to accommodate the problems of particular paratransit riders. DART has no appeal process for its paratransit customers to use in contesting such policies, and the Fifth Circuit decision leaves it free to act arbitrarily and capriciously, as it has done in Jason Melton's case.

This case has exceptional importance even beyond its impact on people with disabilities, because the Fifth Circuit opinion conflicts with the plain language of the statute, conflicts with relevant regulations, conflicts with agencies' interpretation of their own regulations, conflicts with the opinion of the District of Colombia Circuit Court of Appeals applying the ADA in *Burkhart v. Washington Metropolitan Area Transit Authority,* 112 F.3d 1207, 1210 (D.C. Cir. 1997), conflicts with opinions of the Supreme Court applying the Rehabilitation Act, including *Alexander v. Choate,* 469 U.S. 287 (1985), and conflicts with the opinion of the Eleventh Circuit applying the Rehabilitation Act in *United States v. Bd. of Trustees of the University of Alabama,* 908 F.2d 740, 751 (11th Cir. 1990).

I. THE HOLDING OF THE FIFTH CIRCUIT CONFLICTS WITH THE PLAIN LANGUAGE OF THE ADA AND ITS IMPLEMENTING REGULATIONS.

Statutory Provisions

Title II part A of the ADA provides that "Subject to the provisions of this title [Title II], no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.[11] A "qualified individual with a disability" means an individual with a disability who *"with or without reasonable modifications to rules, policies, or practices*, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2) (emphasis added).

With the help of an attendant, Jason is able to use paratransit services.[12] Thus, he is a qualified individual with

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[11] There is no doubt that DART is a "public entity" as defined by 42 U.S.C. § 12131(1). Appendix, A-4.

[12] Note that the modification that Jason seeks would not contravene the paratransit plan that DART has filed with the Federal Transit Administration, which, as described by the Fifth Circuit below, states that "riders using the system must wait at . . . [a] safe waiting area . . . as close as possible to the entrance of the pick-up location." Jason's entrance is on the public alley, and that is where he seeks to be picked up. Fifth Circuit opinion, Appendix, A-15.

a disability as defined above. Furthermore, there is simply nothing in Title II that excepts transit providers from the application of Title II part A. Part A plainly applies.

The Fifth Circuit would read into part A a limitation that is not there. The Fifth Circuit suggests that the only actionable discrimination by a transit provider is that which contravenes the transit plan.[13] To be sure, violating the plan is actionable discrimination, 42 U.S.C. § 12143(e)(4), but that is not the *only* form of actionable discrimination. The statute makes it clear that there are other forms as well. *See, e.g.*, 42 U.S.C. § 12143(e) (discrimination "includes" violation of the plan). Some are specific, *see* 42 U.S.C. § 12142(a); 42 U.S.C. § 12142(b); 42 U.S.C. § 12142(c); 42 U.S.C. § 12143(a), but the statute also provides a general prohibition against discrimination. 42 U.S.C. § 12132.[14] There is simply nothing in the statute stating that the general provision is inapplicable.

The Fifth Circuit apparently views the existence of certain specifically-defined kinds of discrimination as excluding the possibility that the general antidiscrimination provision also applies. Not only is there no statutory support for this view, it is contrary to the way the Fifth Circuit and other circuit courts have interpreted other civil rights laws,[15]

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[13] Fifth Circuit opinion, Appendix, A–23,24

[14] Appendix, A-4

[15] *See, e.g., Porter v. Adams*, 639 F.2d 273, 277-278 (5th Cir.Unit A 1981) (considering the Government Employee Rights Act [2 U.S.C. § 1201, *et seq.*], and stating: "The reasonable conclusion, therefore, is that by drafting § 717 to prohibit 'any discrimination', Congress intended to bar the federal government from engaging in all those forms

and is contrary to the way a prior panel of the Fifth Circuit has treated Title II of the ADA. That panel, unlike the panel considering the present case, recognized that the general antidiscrimination provision of Title II part A has general application, despite the fact that part B includes certain specific examples of unlawful conduct. *Coolbaugh v. State of Louisiana*, 136 F.3d 430, 437 (5th Cir. 1998), *cert. denied*, 525 U.S. 819 (1998), *recognized as overruled on other grounds, Reickenbacker v. Foster*, 274 F.3d 974,978 (5th Cir. 2001).

The Fifth Circuit's interpretation is also inconsistent with the statute's construction. Part B provisions define certain conduct as discriminatory "for purposes of Sec. 12132," *which is the part A provision* dealing with discrimination.[16] If part A provisions do not apply to part B, why did Congress relate part B definitions of discrimination back to part A? Clearly, Congressional intent was that the

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of discrimination identified in §§ 703 and 704, and others as well."); *Brazoria County, Tex. v. EEOC*, 391 F.3d 685, 691 (5th Cir. 2004); *Haddon v. Executive Residence at the White House*, 313 F.3d. 1352, 1356-7 (Fed. Cir. 2000)(considering whether prohibition of discrimination under the Government Employee Rights Act includes a prohibition against retaliation, even though retaliation is not specifically mentioned in the act, and holding "It is quite sensible to conclude that Congress intended for section 1202, and thus section 1219, to include reprisal. Protection against discrimination would be extremely thin if an employer could freely fire an employee for filing a discrimination claim.") *See also Ayon v. Sampson*, 547 F.2d 446, 449-50 (9th Cir. 1976); *Hale v. Marsh*, 808 F.2d 616,619 (7th Cir. 1986).

[16] *See* 42 U.S.C. §§ 12142; 12143; 12144; 12146; 12147; 12148; 12162. *See also Burkhart v. Washington Metro. Area Trans. Auth.*, 112 F.3d 1207, 1210 (D.C. Cir. 1997).

nondiscrimination provisions of part A would apply to part B. Part B simply adds specificity in certain areas; it does not supplant the more general provision in part A

There is simply nothing in the statutory language justifying the narrow view of discrimination evidenced in the Fifth Circuit opinion.[17] Moreover, the Fifth Circuit fails to give the deference due the opinions of the enforcing agencies.

Regulatory Provisions

In holding, without any statutory or case authority, that none of the regulations in Title II part A apply to any transit provider also covered by part B, the Fifth Circuit decision relies entirely on a single DOJ regulation, 28 C.F.R. § 35.102(b),[18] which provides:

> To the extent that public transportation services, programs, and activities of public entities are covered by subtitle B of title II of the ADA (42 U.S.C. 12141), they are not subject to the requirements of this part.

This regulation simply does not support the Fifth Circuit's interpretation. The regulation does *not* say that public transit systems governed by part B are not subject the part A. Instead, it says that they are not covered *only to the*

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[17] The Fifth Circuit's view is also contrary to the Congressional finding that "individuals with disabilities continually encounter various forms of discrimination, including . . . failure to make modifications to existing facilities and practices . . .." 42 U.S.C. § 12101(a)(5). Appendix, A-3

[18] The Fifth Circuit decision erroneously refers to this provision as 29 C.F.R. § 35.102(b). Fifth Circuit opinion, Appendix, A-20; A-6

extent of the part B coverage. That is the only interpretation of the regulation that gives meaning to all its words.

In case there could be any doubt as to the meaning of this particular regulation, DOJ and DOT regulations and interpretations make it plain. DOJ explains that matters not specifically covered under part B are subject to the part A regulations. 28 C.F.R. Part 35 App.A, § 35.102 (Application).[19] Moreover, the DOT part B regulations provide that part B entities may be subject to the part A regulations. 49 C.F.R. § 37.21(c).[20] That provision makes clear that both the part A and part B rules apply to transit entities subject to DOT oversight, in the absence of a conflict. *Id.* See also 49 C.F.R. Part 37 App. D, § 37.21 (Applicability, General).[21] Regulations and interpretations by both the DOJ and the DOT obviate the need for part A's reasonable modification requirement to be repeated in part B, and that regulation, 28 C.F.R. § 35.130(7),[22] does apply to DART's operations.

Indeed, even in the absence of specific regulations, the law requires public entities to make reasonable modifications

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[19] Appendix, A-6

[20] Appendix, A-11

[21] Appendix, A-11

[22] 28 C.F.R. § 35.130(b)(7) provides that "[a] public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." Appendix, A-6

of policies, practices, and procedures if necessary to avoid discrimination. *Alexander v. Choate,* 469 U.S. 287, 300-302 (1985) (interpreting Sec. 504 of the Rehabilitation Act); *Henrietta D. v. Bloomberg*, 331 F.3d 261, 273-277 (2d Cir. 2003) (interpreting ADA Title II). *See also Olmstead v. L. C.*, 527 U.S. 581, 591 (1999) (Title II).

In interpreting an agency's own regulation, the agency is accorded significant deference, and courts should give the agency's interpretation of its own rules controlling weight unless it is plainly wrong. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *see also Martin v.Occupational Safety and Health Review Comm'n,* 499 U.S. 144, 150-157 (1991).

The Fifth Circuit did not follow this precedent. Not only did it reject agency guidance, it engaged in a distorted interpretation of the DOJ regulation that directly conflicts with the parallel regulation by DOT.[23] The Fifth Circuit's interpretation also conflicts with the DOT's Section 504 regulations (as described in Part III below).

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[23] In enacting the ADA, Congress manifested a clear intent that public entities make reasonable modifications in order to avoid discriminating on the basis of disability. See 42 U.S.C. § 12101(a)(5), Appendix, A-3 Thus, the DOJ was not authorized to promulgate a regulation exempting public transit providers' services from that requirement, even if it was the DOJ's intent to do so. Clearly that was not DOJ's intent, as shown above.

II. THE HOLDING OF THE FIFTH CIRCUIT CONSTRUING THE ADA CONFLICTS WITH THE OPINION OF ANOTHER CIRCUIT COURT.

The Fifth Circuit opinion also conflicts with the analysis in *Burkhart v. Washington Metro. Area Trans. Auth.*, 112 F.3d 1207 (D.C. Cir. 1997), which states that part A regulations apply to entities regulated under part B.

> The relevant provision of the ADA is Title II which governs "public entities," including agencies of state and local governments. 42 U.S.C. §§ 12131(1), 12132. Title II is divided into two parts: Part A generally prohibits disability-based discrimination by any public entity. *Id.* § 12132. Part B provides specific examples of prohibited discriminatory conduct in the public transportation context. *Ib.* §§ 12142, 12143(a), 12144, 12146, 12147, 12148, 12162 (defining "discrimination for purposes of section 12132"). *Of course, public transportation providers are also subject to the general nondiscrimination mandate of Title II(A). See id.* § 12131 (defining a "public entity" subject to section 12132 as including "any commuter authority").

Burkhart, 112 F.3d at 1210 (emphasis supplied). The court in *Burkhart* went on to say in a footnote that "[o]n appeal, WMATA contends that Part A of Title II does not apply to providers subject to Part B. We decline to address this challenge as it was not properly preserved below." *Id.*, n.1.

The most reasonable interpretation of this footnote is

that the D.C. Circuit decided that part A regulations applied to part B entities without considering the improperly preserved challenge by the transportation authority. However, the Fifth Circuit held, in effect, that the D.C. circuit did not decide the question, thereby making the case one of first impression.[24]

Without citing supporting precedent, the Fifth Circuit rejected any reliance on *Burkhart*, finding that the case "decline[d] to address the contention that part A regulations do not apply to public transportation providers subject to part B because the contention was not properly preserved."[25]

Despite the Fifth Circuit's erroneous analysis, *Burkhart* clearly holds that the part A regulations do apply to part B activities. It holds that public transportation providers are subject to the nondiscrimination mandate of part A, then cites 28 C.F.R. § 35.160, a part A regulation, in support of the plaintiff's claim against a part B entity. *Id.*, 1210, 1211.[26]

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[24] Fifth Circuit opinion, Appendix, A-19

[25] Fifth Circuit opinion, Appendix, A-22, n. 6

[26] *Burkhart* has been followed in *Martin v. Metro. Atlanta Rapid Transit*, 225 F. Supp.2d 1362, 1373 (N.D. Ga. 2002), although the Fifth Circuit in effect says it should not have been followed. Fifth Circuit opinion, A-22, n. 6

III. THE HOLDING OF THE FIFTH CIRCUIT CONSTRUING THE REHABILITATION ACT CONFLICTS WITH THE PLAIN LANGUAGE OF THE ACT AND ITS IMPLEMENTING REGULATIONS, WITH OPINIONS OF THIS COURT, AND WITH THE OPINION OF ANOTHER CIRCUIT COURT.

The Fifth Circuit opinion summarily rejects Jason's claim under Section 504,[27] relying on an older Fifth Circuit case, *Hainze v. Richards,*[28] for the proposition that Section 504 and the ADA are interpreted consistently. Thus, it reasons, because it interprets the ADA to exempt public entities regulated under part B of Title II from all part A regulations (and thus from the requirement of making reasonable modifications), the exemption also extends to the Rehabilitation Act claim.[29] This analysis is overly simplistic, and it takes *Hainze* out of context.

The Fifth Circuit in *Hainze* relied on the ADA provision in 42 U.S.C. § 12133, which states that "[t]he remedies, procedures, and rights set forth in [Section 504] shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title." That provision specifies how *the ADA* is to be interpreted. It does not speak to how Section 504 is to be interpreted. The Fifth Circuit thus

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[27] Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, Appendix, A-3.

[28] *Hainze v. Richards,* 207 F.3d 795, 799 (5th Cir.), *cert. denied* 531 U.S. 959 (2000).

[29] Fifth Circuit opinion, Appendix, A-25

turned the provision relied on by *Hainze* on its head.

As an act predating the ADA, the Rehabilitation Act should be used as a guide in interpreting the ADA, instead of the other way around. As this Court said in *Toyota Motor Mfg., Kentucky, Inc. v. Williams,* 534 U. S. 184, 193 (2002), "Congress' repetition of a well-established term generally implies that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations." *See also Bragdon v. Abbott,* 524 U.S. 624, 631 (1998); *FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426, 437-438 (1986); *ICC v. Parker,* 326 U.S. 60, 65 (1945).

Section 504 has been conclusively interpreted to require covered entities to provide reasonable policy modifications. *Alexander v. Choate,* 469 U.S. 287, 300-302 (1985). In fact, Section 504 has been interpreted as requiring a transit provider to make reasonable program modifications. In *United States v. Board of Trustees for University of Alabama,* 908 F.2d 740, 751 (11th Cir.1990), the court held that transportation services provided to college students with disabilities were not equal to, nor as effective as, those offered to persons without disabilities, and the transportation provider failed to reasonably accommodate the persons with disabilities. The court of appeals held that, under the Supreme Court's interpretation of § 504, recipients of federal financial assistance are required to make reasonable modifications or accommodations, so long as they do not cause "undue financial or administrative burdens." *Id.*, 908 F.2d at 747, 751, *citing Southeastern Community College v. Davis,* 442 U.S. 397, 412-413 (1979), and *Alexander v. Choate,* 469 U.S. 287, 301 (1985).

Since the Rehabilitation Act requires reasonable modifications independently from the ADA, the Fifth Circuit

decision holding that it does not conflicts with the clear meaning of the act and the cases interpreting it.

Moreover, the sole authority (mistakenly) asserted for the Fifth Circuit's opinion regarding the ADA — the DOJ regulation at 28 C.F.R. § 35.102(b) — is inapplicable to Section 504, and there is no corresponding 504 regulation.[30] On the contrary, the DOT's Section 504 regulations expressly require compliance with a general antidiscrimination provision, 49 C.F.R. § 27.7(a), various specific discrimination provisions, 49 C.F.R. § 27.7(b)-(d), *and* the statutory and regulatory provisions in *both* part A and part B. 49 C.F.R. § 27.19(a).[31]

Clearly, whatever the nature of the ADA regulations, paratransit providers are not exempt from the Rehabilitation Act's antidiscrimination provisions just because the providers are also covered by the DOT's regulations in part B of Title II of the ADA.

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[30] In fact, the DOJ interpretation of 28 C.F.R. § 35.102 expressly notes that programs receiving federal assistance are covered by § 504 of the Rehabilitation Act. 28 C.F.R. pt 35, App. A, Appendix, A-7.

[31] 49 C.F.R. § 27.19(a) states in part that "[r]ecipients subject to this part (whether public or private entities as defined in 49 CFR part 37) shall comply with all applicable requirements of the Americans with Disabilities Act (ADA) of 1990 (42 U.S.C. 12101-12213) including the Department's ADA regulations (49 CFR parts 37 and 38), the regulations of the Department of Justice implementing Titles II and III of the ADA (28 CFR parts 35 and 36)....." Appendix, A-10.
See also 49 C.F.R. § 27.9(a).

CONCLUSION

The Supreme Court should grant this petition for a writ of certiorari and reverse the decision of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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